In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 532

GENE O'NEAL AND JOHNNIE JAMES YOUNG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 27-29; R. 22-26) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1963 (R. 27). The petition for a writ of certiorari was filed on October 10, 1963. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether there was probable cause for the arrest of petitioners without a warrant as one of them was leaving a barn in which illegal liquor was stored, and for the incidental seizure of the liquor.

STATEMENT

Petitioners were convicted on three counts of an indictment returned in the United States District Court for the Eastern District of South Carolina charging them with the unlawful removal, concealment and possession of non-taxpaid distilled spirits (Pet. App. 26). Petitioner O'Neal was fined $600 and petitioner Young $1200. Each was also sentenced to imprisonment for two years with provision that on payment of the fine, the remainder of the sentence be suspended and he be placed on probation for a period of five years.

The sole issue is the validity of the seizure of the liquor, which was the subject of a motion to suppress before trial (Pet. App. 11-15). The facts were developed at the trial before the court in the testimony of agent Briggs (Pet. App. 16, 24).

On the evening of June 10, 1960, agent Briggs and two other agents stationed themselves in some woodlands directly behind petitioner O'Neal's house and barn (Pet. App. 17), at a point which agent Briggs stated was "off the curtilage" (Pet. App. 19).

The distance from the woods to the back of the barn was about 15 or 20 feet, and it was about 120 feet from the barn to the house (Pet. App. 17, 20-21). The agents saw lights shining through small cracks in the barn, and could detect the odor of "moonshine" whiskey coming from it (Pet. App. 17-18). They heard sounds of heavy cardboard containers being scraped against each other and the tingling of glass jars. Shortly after 9:45 p.m., two unidentified men near the barn loaded two propane gas cylinders into the trunk of an old model Ford sedan which they had driven into the yard, and then drove away (Pet. App. 18). Sometime after 11:00 p.m., petitioners O'Neal and Young left the house and drove off in a black 1959 Chevrolet (Pet. App. 18-19). They returned about 12:15 and unloaded in the yard what appeared to be empty cases of fruit jars and entered the barn (Pet. App. 19, 21-22). The agents came from the woods to the door of the barn where they stood for several moments; they heard voices inside commenting on the "number of cases they had." At this time the door opened,* Young attempted to come out, and the agents arrested him and O'Neal (Pet. App. 19). At the time of the arrest, the agents were just inside the barn and the two petitioners were within a half foot of each other (Pet. App. 19, 22-23). The agents were able to see two stacks of whiskey about two feet in front of them. They seized

* Although the record is not explicit on this point, the inference is reasonable that it was petitioner Young who opened the door and was arrested as he walked out (Pet. App. 19, 22, 23).

189½ gallons of non-taxpaid whiskey (Pet. App. 20, 23-24). It was stipulated that the agents did not have a search warrant or arrest warrant (Pet. App. 25-26).

ARGUMENT

Petitioners were properly arrested on probable cause to believe that they had been committing a felony, and the seizure incident to the arrest was reasonable and valid. *United States* v. *Rabinowitz*, 339 U.S. 56; *Brinegar* v. *United States*, 338 U.S. 160.

From their vantage point in the woods the agents were able to detect the odor of "moonshine" whiskey coming from the barn. They had seen the hauling away of propane gas cylinders, customarily used in the operation of distilleries. They had also observed the petitioners unloading cartons of fruit jars, which they knew from their professional experience are used to bottle illicit whiskey. Thus, before they came near the barn, the agents had reasonable cause to believe that illicit whiskey was being bottled and stored on the premises.

At the barn the agents' belief was confirmed by overhearing petitioners' conversation in the barn as to the "number of cases they had."

There was no unauthorized forcible entry into the barn. The door was not even touched by the agents; it was opened by one of the petitioners preparatory to leaving (Pet. App. 19, 22, 23). At that time, with petitioners Young and O'Neal standing beside each other and the stacked whiskey, the agents clearly had probable cause to believe that

a felony (possession of non-taxpaid whiskey) was being committed in their presence. The arrests without a warrant were therefore legal. 26 U.S.C. 7608. The seizure of the whiskey was incident to the lawful arrest. The mere entry of the agents into the woods without permission would not invalidate the arrests even if the woods belonged to O'Neal. See *Hester* v. *United States*, 265 U.S. 57, 58; *Monnette* v. *United States*, 299 F. 2d 847, 850 (C.A. 5); *Giacona* v. *United States*, 257 F. 2d 450, 456 (C.A. 5), certiorari denied, 358 U.S. 873. The agents did not enter any building, not even the barn, until they had made the arrest. That circumstance distinguishes *Silverman* v. *United States*, 365 U.S. 505, where driving a spike microphone into adjoining premises for the purpose of listening was held to invade a constitutionally protected area.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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